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October 30, 2015

By Overnight Mail

Michigan Liquor Control Commission
Attn: Commissioner Teri Quimby
525 W. Allegan Street
Lansing, MI 48913

Re: Request for Declaratory Ruling

Dear Commissioner Quimby:

We write to request a declaratory ruling regarding the applicability of Michigan's statutes and administrative rules to our business model. MICH. ADMIN. CODE R. 436.1971. Below, we summarize the relevant and material facts and then provide references to the applicable statutes and rules.

A. Relevant and Material Facts

Liquor Limo[®], our smartphone application and website, helps consumers purchase alcohol beverages from a licensed retailer for either home delivery or in-store pickup in a manner that respects existing licensed channels and, we believe, complies with Michigan law. The management team of Liquor Limo includes industry leaders with significant experience in wine brand development and the distribution of wine, beer and spirits who therefore understand the importance of preserving regulatory control over alcohol beverage sales. Liquor Limo initially launched in Colorado and is now expanding to other states. In Michigan, we would offer our services to off-premises retail licensees of beer and wine.

We believe our system provides consumers with a modern way to order alcohol beverages electronically within established three-tier regulatory structures. It *does not* contemplate any interstate shipping of alcohol; every bottle is sold by an in-state retailer. Moreover, as explained further below, Liquor Limo has carefully constructed its operation to ensure that a licensed retailer is fully responsible to the state maintains control over the sale and delivery process.

Liquor Limo has built alcohol home delivery and in-store pick up apps and an associated website to assist Michigan retailers in reaching consumers on-line. Unlike other competing alcohol promotional apps currently operating, our apps and website are differentiated as follows:

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1. We feature licensed retailers. In fact, after entering the Liquor Limo portal the consumer is required to select a licensed alcohol retailer in his/her state as the user's "home store."
2. A consumer shops the near real time inventory of the "home store" that they selected. Liquor Limo has no control over any of the licensed retailer's prices displayed on the Liquor Limo website and apps.
3. A consumer will enter their credit card information into a secure file transfer protocol (FTP) payment gateway (*e.g.*, Stripe or Authorize.net) once they have made their selection. That information then is transmitted directly to the licensed alcohol retailer that processes the payment. Liquor Limo never takes payment for any transaction.
4. The licensed retailer then can accept or reject the order and, if accepted, transports the order to the customer's home/office and is responsible for verifying that the consumer is of the required drinking age and that the customer is not intoxicated, in compliance with Michigan laws and regulations on delivery by licensed retailers. MICH. COMP. LAWS §§ 436.1203, 436.1503; MICH. ADMIN. CODE r. 436.1011(7)(b), 436.1527. Liquor Limo never takes possession of the alcohol.
5. Liquor Limo charges participating licensed retailers a flat fee per transaction, currently set at \$0.99.

We believe Liquor Limo's role in promoting participating retailers and collecting a fee for that service does not constitute selling alcohol beverages or any other activity that would require a license under Michigan Law. Instead, Liquor Limo provides a service to retailers in a manner analogous to the services provided to licensees by a host of other non-licensees, such as advertising agencies, credit card companies, media outlets and the like.

Although Michigan does not currently have guidance on smartphone applications and websites used by consumers to help them purchase alcohol beverages, the alcohol regulatory bodies of California, New York, Texas, and the District of Columbia recently have issued advisory opinions on "third party providers" like Liquor Limo. These jurisdictions found that third party providers could develop a compliant ordering system with licensed retailers to process sales of alcohol beverages over the Internet, if certain criteria are met. In general, licensees must retain ultimate control and responsibility for the transaction; receive funds directly from the consumer; and execute, and be liable for, the delivery of alcohol beverages. Third party providers may charge licensed retailers a transaction fee for services provided, but may not receive a portion of the licensed retailer's profits. Additionally, third party providers may not sell alcohol beverages to customers or store or keep alcohol beverages for sale.

The D.C. Alcoholic Beverage Control Board issued the most recent advisory opinion in August 2014. The D.C. advisory opinion was issued with an understanding of the opinions issued by the other three jurisdictions and set forth eleven principles by which online third party provider and licensees must abide:

1. The transaction to purchase alcohol beverages must take place between the customer and licensee. Credit or debit card information provided to the online third party provider must be transferred or redirected to the licensee. Only the licensee may process and complete the transaction.
2. The licensee must retain the ability to determine whether to complete an order and retain the authority to deny the order, if necessary.
3. The licensee is responsible for delivery of the alcohol beverages and determining whether the customer is of legal age.
4. Online third party providers may promote, market, and facilitate the sale of alcohol beverages over the internet provided that the licensee retains ultimate control and responsibility over the sales transaction with the customer. All funds for each sale shall be transferred to the licensed off-premise retailer.
5. The online third party provider shall not sell alcohol beverages.
6. The online third party provider shall not charge or process the customer's credit or debit card directly or collect any funds from the customer.
7. The online third party provider shall not store or keep alcohol beverages for sale.
8. The online third party provider shall not package, fill, or ship the order to the consumer.
9. The alcohol beverages sold to the consumer must be in the possession of the licensee.
10. The online third party provider can charge licensed retailers a flat monthly fee or other type of transaction fee for their services.
11. The online third party provider shall not collect, receive, or retain any funds or fees that stem from the transaction between the consumer and the licensee.

Liquor Limo's business model meets all of the criteria discussed in these advisory opinions. Retail licensees may accept or reject a customer's order. If the licensee accepts the transaction, the licensee will process the consumer's payment and then Liquor Limo will receive reasonable compensation (currently \$0.99) from the licensee. Liquor Limo does not select, set the prices of, store, sell, package, ship, or deliver alcohol beverages. Liquor Limo does not receive a portion of the licensed retailer's profits. Liquor Limo has written agreements with all licensees.

B. References to the Applicable Statutes, Rules, or Orders

Below we summarize the statutes and rules applicable to sales, retail licensees, advertising, and orders and delivery. The retailer is responsible for delivery of the alcohol beverages to the consumer and must comply with the Michigan laws cited below.

1. Sales

Liquor Limo's activities do not constitute "sales" because the licensed retailer sells and furnishes the "alcoholic liquor" to the consumer. *See* MICH. COMP. LAWS §§ 436.1111(7), 436.1105(3). Since Liquor Limo does not sell alcoholic liquor, it is not a retailer, which Michigan defines as "a person licensed by the commission who sells to the consumer." MICH. COMP. LAWS § 436.1111(5). Liquor Limo assists consumers in the purchase of alcoholic liquor from off-premises licensees licensed by the Commission. MICH. ADMIN. CODE r. 436.1001(m).

2. Retail Licensees

Licensed retailers select which items to offer for sale to a consumer on Liquor Limo's application and website. The retailers that Liquor Limo will feature must have a specially-designated merchant license in order to deliver beer or wine to consumers. MICH. COMP. LAWS § 436.1533. Retailers with specially designated merchant licenses may deliver beer or wine to a consumer's home or another designated location, but not spirits, unless the Commission authorized a licensee to sell or deliver spirits. MICH. COMP. LAWS §§ 436.1203(2), (11), 436.1901(4).

3. Orders and Delivery

Both Liquor Limo and the retailer will ensure that orders for alcoholic liquor placed through its application are not processed or delivered between the hours of 2 a.m. and 7 a.m., on any day, or between 2 a.m. and 12 noon on Sunday. MICH. ADMIN. CODE r. 436.1503. Liquor Limo's application and website will make it impossible for a consumer to schedule an order for delivery any time after midnight. Liquor Limo expects that retailers will further limit the hours that consumers may place an order for delivery to a time earlier than midnight so that retailers may schedule and complete deliveries within the permitted hours. For example, the last orders for delivery may need to be placed by 9 p.m. Orders placed with licensed retailers through the Liquor Limo application will be delivered by the retailer's employees, or a third party if the municipality is surrounded by water and inaccessible by motor vehicle. MICH. COMP. LAWS § 436.1203(11)(a), (12).

Retail licensees would deliver alcoholic liquor off the licensed premises in compliance with the regulation that permits off-premises licensees to "deliver a preordered quantity of alcoholic liquor to a customer." MICH. ADMIN. CODE r. 436.1011(7)(b). Retailers must abide by that rule's prohibition on "delivery to a customer on the campus of a 2- or 4-year college or university, unless the customer is licensed by the commission." *Id.*

Liquor Limo's software will help screen underage individuals and prevent them from placing orders through the application and website. Additionally, retail licensees will be responsible for ensuring the person to whom the delivery of alcoholic liquor is made is at least 21 years of age and maintaining "proof for inspection by the commission of the documents used to determine the age of the individual to whom the alcoholic liquor was delivered." MICH. ADMIN. CODE r. 436.1527(1), (3); *see also* MICH. COMP. LAWS § 436.1203(11)(b). Also, retail licensees must take steps to prevent individuals who are at least 21 years old from placing orders for individuals under 21 years of age. If a retail licensee takes an order through Liquor Limo's application or website "from a purchaser for delivery to an individual or business at an address *other* than that of the person making the purchase," the licensee may deliver the order to that address "provided the individual accepting delivery of the alcoholic liquor is 21 years of age or older." MICH. ADMIN. CODE r. 436.1527(2)(emphasis added). The retailer's employee that delivers the alcoholic liquor will be responsible for verifying the age of the individual accepting the delivery to ensure that recipient is 21 years of age or older. *Id.*

4. Advertising

Liquor Limo may offer banner advertisements to manufacturers, outstate sellers of beer, outstate sellers of wine, and wholesalers. This advertising is not "cooperative advertising" because Liquor Limo is neither a licensee nor a vendor of spirits or other alcoholic liquor. *See* MICH. ADMIN. CODE r. 436.1001(d), (j), (w), 436.1319(1). Liquor Limo's mobile application and website are no different than a radio station or a newspaper in which a supplier could place an advertisement. The retail licensee that the consumer would designate as his or her "home store" also does not trigger the cooperative advertising ban because Liquor Limo is not a manufacturer, outstate seller of beer, outstate seller of wine, or wholesaler in the state of Michigan that would provide this advertising of the retail licensee's name. MICH. ADMIN. CODE r. 436.1315(a), 436.1319(3).

Although non-majority investors in Liquor Limo have engaged in business as wholesalers in other states, Liquor Limo is not owned by an alcohol beverage manufacturer or wholesaler and does not act as a wholesaler in Michigan. Nor is there any crossover in the officers and directors between any licensed manufacturer or wholesaler and Liquor Limo. To the extent that this interest raises concerns over cooperative advertising, we note that Drizly, a third party provider, operates in Michigan. Drizly is partially owned by the Wine & Spirits Wholesalers of America (WSWA), which also has a seat on Drizly's board of directors.¹ Moreover, *even if* Liquor Limo were treated like a manufacturer or wholesaler, Michigan law expressly authorizes the provision of advertising items from manufacturers and wholesalers to other licensees, including retailers like the retailers that chose to participate in the Liquor Limo application and website. *See* MICH. COMP. LAWS § 436.1609(2).

¹ Tripp Mickle, *Liquor Distributors Invest in Tech Firm to Boost E-Commerce in Alcohol*, WALL ST. J., May 12, 2015, <http://www.wsj.com/articles/liquor-distributors-invest-in-tech-firm-to-boost-e-commerce-in-alcohol-1431461864>.

C. Request for Declaratory Ruling

We aim to offer to consumers a convenient way to purchase alcohol beverages throughout the U.S. in a way that meets the needs of busy adult consumers, particularly those in urban areas where congestion, parking, and time constraints make driving to stores difficult. Liquor Limo does this through the existing licensed three-tier system and wishes to comply with all applicable laws and regulations. We accordingly request a declaratory ruling to ensure that you agree that our business model will comply with Michigan law.

If you would like additional information or have questions regarding our business operations, you may contact me by email at msorini@mwe.com or by phone at 202-756-8284.

Sincerely,

A handwritten signature in black ink, appearing to read "Marc E. Sorini". The signature is fluid and cursive, with the first name "Marc" and last name "Sorini" clearly distinguishable.

Marc E. Sorini
McDermott Will & Emery LLP

cc: Kevin Hicks, Chief Executive Officer
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